STATE OF MICHIGAN

COURT OF APPEALS

DONALD P. GREEN and GBS FAMILY INVESTMENT COMPANY, Plaintiffs-Appellants, v TROWBRIDGE 1, INC., Defendant-Appellee.	UNPUBLISHED July 1, 2003 No. 230349 Washtenaw Circuit Court LC No. 99-010898-CK

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

Plaintiffs appeal from an order that denied plaintiffs' motion for summary disposition and granted defendant's motion for summary disposition, and from a declaratory judgment in favor of defendant that the amount due and payable under the mortgage note is $2,718,918.13. We affirm in part and remand in part.

I. Facts

In 1987, Huron Villas, a partnership in which plaintiffs hold a combined 45.36 percent interest, signed a ten-year real estate mortgage note with a bank. When the note came due on January 1, 1998, Huron Villas failed to make the final balloon payment, and the bank notified Huron Villas that it would foreclose on the property unless the note was paid. Stanley Dickson, Jr., a partner with a 45.36 percent interest in Huron Villas, formed defendant Trowbridge 1, Inc., and purchased the note from the bank. Plaintiffs brought suit for declaratory judgment against defendant to determine the amount due and owing under the note. Plaintiffs and defendant brought cross-motions for summary disposition pursuant to MCR 2.116(C)(10) and, as noted, the trial court denied plaintiffs' motion and granted defendant's motion.[1]

[1] Under MCR 2.116(C)(10), summary disposition should be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has ruled that a trial court "may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28
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II. Analysis

A. Breach of Fiduciary Duty Claim

Plaintiffs assert that defendant should not recover more from Huron Villas than defendant paid for the note because Dickson breached his fiduciary duty to Huron Villas by forming Trowbridge and purchasing the note.

As the trial court recognized, plaintiffs' suit is an action to determine the amount plaintiffs owe on the note. Moreover, plaintiffs' attempt to characterize this case as a breach of fiduciary duty in order to pierce the corporate veil, merely evades the issue whether the trial court ruled correctly on the motions for summary disposition. Further, plaintiffs cite no authority to support their assertion that an assignment of a partnership debt, by a lender, to a corporation formed by one of the partners is in contravention of Michigan law. Further, plaintiffs also fail to cite law that states that such activity is a breach of fiduciary duty. Accordingly, we view these issues as abandoned on appeal. See *Flint City Council v State of Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2003) ("this Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal.")

We also reject plaintiffs' assertion that because Dickson knew that plaintiffs wanted the bank to foreclose on the property, he breached his fiduciary duties by accepting the bank's offer to sell the note. First, plaintiffs' reliance on the Uniform Partnership Act, MCL 449.21(1), is misplaced. Defendant, Trowbridge 1, Inc., is not a partner of Huron Villas and, therefore, it has no duty to account. Clearly, the assignment of the note from the bank to defendant was not a "transaction connected with the formation, conduct, or liquidation of the partnership." MCL 449.21(1). Further, the mortgage and note securing the mortgage were a partnership liability, not a partnership asset, and therefore cannot be considered partnership "property," within the meaning set out in MCL 449.8. Moreover, plaintiffs offer no evidence to show that defendant committed a fraud or wrong, or that plaintiffs suffered unjust loss or injury to justify their assertion that the trial court should have pierced the corporate veil. See *Nogueras v Maisel & Assoc*, 142 Mich App 71, 86; 369 NW2d 492 (1985).

B. Property Tax Payments

Plaintiffs also contend that the trial court erred by failing to hold defendant liable for its failure to pay property taxes from the escrow account. MCL 565.163 states:

> If, pursuant to an agreement, a mortgagor has paid sufficient funds into an escrow account for the purpose of paying taxes on mortgaged real property, and if the mortgagee or his agent has not paid those property taxes, then the person to whom

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(1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties is viewed "in the light most favorable to the party opposing the motion." *Id*.

> the mortgagor paid the funds shall be liable to the mortgagor for any penalties or fees incurred by the mortgagor as a result of that failure to pay taxes.

The relevant provisions of the mortgage show that any payment of taxes from the escrow account was at the complete discretion of defendant mortgagee. Our Supreme Court has held that as between the mortgagor and the mortgagee, the duty of paying taxes is primarily upon the mortgagor. *Connecticut Mut Life Ins Co v Bulte*, 45 Mich 113; 7 NW 707 (1881); see also 13 Michigan Digest, Mortgages, § 70, p 770. Moreover,

> Under a provision entitling the mortgagee to pay the taxes on the failure of the mortgagor to do so, the mortgagee may pay the taxes before they actually become delinquent . . . . Usually it is not mandatory on the mortgagee to avail himself of the privilege given by a provision permitting him to pay taxes on default of the mortgagor, but the agreement of the parties may be such as to impose on the mortgagee the primary obligation to pay taxes. [59 CJS, Mortgages, § 307.]

Here, the mortgage clearly states that the mortgagor had the primary obligation to pay property taxes, and that the mortgagee had the right, but was not required, to do so. Huron Villas was in default on its payments for the duration of the mortgage, and it also failed to pay the balloon payment due on January 1, 1998. Pursuant to the mortgage, defendant mortgagee had the option of holding the funds in the escrow account as additional security for the indebtedness, or putting the funds in the escrow account toward the payment of the indebtedness. Defendant exercised its right to apply the escrow payments to the sums due under the mortgage, which was understandable considering Huron Villas' history of late payments and default. For these reasons, the trial court correctly held that defendant had no liability for not paying property taxes from the escrow account.

C. Late Fee

Plaintiffs argue that the trial court erred by interpreting the note to allow defendant to charge a late fee on the balloon payment. We reject defendant's argument that the balloon payment is "merely one of many" installment payments, thereby warranting a five percent late fee. This issue was addressed by the Court of Appeals for the Sixth Circuit in *In Re Brunswick Apartments of Trumbull Co, Ltd*, 169 F3d 333 (CA 6, 1999). While this Court is not bound by a federal court decision construing Michigan law, we may follow the decision where, as here, we find the reasoning persuasive. *Allen v Owens-Corning*, 225 Mich App 397, 402; 571 NW2d 530 (1997).

In *Brunswick, supra*, the lower court held that "the bank's effort to convert a 5% 'service charge' on 'installments' in default into a 5% service charge on the entire unpaid balance of $1,250,000" was unreasonable, and the Court of Appeals for the Sixth Circuit affirmed. The Sixth Circuit held that language in a promissory note which authorized the lender to assess a five percent service charge on each "installment" that was not paid in a timely fashion, did not permit the lender to assess a five percent penalty on the final balloon payment owed at the date of maturity. The Court agreed with the lower court's observation that " 'standard commercial practice' imposes service charges for nonpayment of periodic installments, not on the principal balance owed at maturity." *Brunswick, supra*, 335. Here, we similarly hold that the trial court's interpretation of the note that permits defendant to charge Huron Villas a five percent late fee on

the balloon payment is reversible error and, therefore, we remand for recalculation of the amount due under the note.

D. Attorney Fees and Costs

Plaintiffs next argue that the trial court erred in its award to defendant of attorney fees and costs. Here, the note and mortgage provide for payment of costs and reasonable attorney fees incurred by the mortgagee in collecting or enforcing payment of the note. We have held that contractual provisions for payment of reasonable attorney fees are judicially enforceable, *Central Transport v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984), and that the burden is on the party seeking the attorney fees to establish the reasonableness of the fees, *Bolt v City of Lansing (On Remand)*, 238 Mich App 37, 61; 604 NW2d 745 (1999). Here, the trial court erred by failing to make findings of fact and by placing the burden on plaintiffs to *disprove* defendant's requested amount of attorney fees. Therefore, we remand for the trial court to determine the reasonableness of the attorney fees requested by defendant.

E. Interest on the Note

Plaintiffs also maintain that the trial court erred in allowing defendant to charge interest on the note. In support of their claim, plaintiffs cite our holding in *Michaels v Mellish*, 55 Mich App 374, 383; 222 NW2d 247 (1974): "Where a debtor is willing and ready to make payment of an obligation but is prevented from doing so by the act or omission of his creditor, the accrual of the interest on the obligation is suspended." However, Huron Villas was never prevented from tendering payment to the bank or defendant. Further, Huron Villas was never "willing and ready to make payment" of its obligation. Plaintiffs' willingness to allow the note to go into foreclosure cannot be construed as "being ready and willing to make payment." Thus, *Michaels* is clearly inapposite.

Plaintiffs cite no other authority to support their claim that they owe no interest under the note. It is well-established that "a party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). Therefore, the trial court correctly ruled that Huron Villas is required to pay the default rate of interest on the note from the time of its default.

F. Plaintiffs' Claimed Damages

Also, plaintiffs assert that the trial court erred by dismissing their claim for damages. Specifically, plaintiffs contend that Huron Villas should be awarded damages because of a theoretical lost opportunity to sell the property at the bank's appraised value of $3,950,000. However, plaintiffs offer no evidence regarding any prospective or actual buyer of the property at that price. Accordingly, plaintiffs' claim for damages is simply speculative.[2]

Further, plaintiffs cite no case law, statutes, or court rules to support their contention that the trial court erred by failing to award damages. "[A] bald assertion without supporting

[2] It is well-established that damages are not recoverable if they are conjectural or speculative. *Fister v Henschel*, 7 Mich App 590; 152 NW2d 555 (1967).

authority precludes appellate examination of the issue." *Impullitti v Impullitti*, 163 Mich App 507, 512; 415 NW2d 261 (1987). Plaintiffs "may not leave it to this Court to search for authority to sustain or reject its position." *Keifer*, *supra*, 294. Therefore, we affirm the trial court's dismissal of plaintiffs' claim for damages.

In sum, plaintiffs have failed to demonstrate that the trial court erred by granting defendant's motion for summary disposition and by denying plaintiffs' motion for summary disposition. Accordingly, we affirm in part, but remand for factual findings and a determination of the reasonableness of defendant's requested attorney fees, and recalculation of the balance due under the note. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens